Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-257

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN THE MATTER OF THE SANCTITY OF
THE SEVENTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

William P. Pointon, Jr.
Appellant.

vs.

Fidelity National Bank, N. A.
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF OKLAHOMA

JURISDICTIONAL STATEMENT

William P. Pointon, Jr.
Attorney pro se
P.O. Box 4130
Nicoma Park, Okl. 73066
(405) 769-3365

A6PP

I. QUESTIONS PRESENTED

1. Can the Oklahoma Courts in exercise of discretion, summarily and arbitrarily deny a citizen the sanctity of the VII Amendment to the Constitution of the United States by refusing to reverse a judgment when the transcript clearly reveals that the trial judge prejudiced Appellant by misinstructing the jury and communicating on two occasions with the jury, while they were out for the verdict, thereby influencing a judgment contrary to the evidence, statutes and the State and Federal Constitutions?

2. Was it proper for the trial court to sustain a demurrer to facts of evidence in violation of the VII United States Amendment, which denied a trial by jury on all the facts and issues when cross-petition clearly demanded jury trial?

3. Did the Oklahoma County trial judge and the Oklahoma Supreme Court abuse their

discretion and therefore violate Appellant's due process and equal protection of the laws provided in the Fifth and Fourteenth Amendments to the United States Constitution?

II. PARTIES

William P. Pointon, Jr., an individual, Appellant.

Fidelity National Bank, N.A., Appellee, subsequently merged into Bank of Oklahoma.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

IN THE MATTER OF THE SANCTITY OF
THE SEVENTH AMENDMENT TO THE
CONSTITUTION OF THE UNITED STATES

William P. Pointon, Jr.
Appellant.

vs.

Fidelity National Bank, N.A.
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF OKLAHOMA

JURISDICTIONAL STATEMENT

IV. OPINIONS BELOW

The opinions of the Oklahoma County District Court are set out at pages 1a through 4a of the Separate Appendix.

The opinions of the Court of Appeals and the Supreme Court of Oklahoma are set out in the Separate Appendix as foll-

ows:

Order of the Oklahoma Supreme Court staying attorney fees, granted, 5a;

Order of the Oklahoma Court of Appeals, affirmed in part, reversed in part, filed January 14, 1986, 6a, 7a, and 8a;

Order of the Oklahoma Court of Appeals, rehearing denied, filed March 4, 1986, 9a;

Order of the Oklahoma Supreme Court, certiorari, denied, filed May 6, 1986, 10a; and,

Order of the Oklahoma Supreme Court, Motion for Writ of Audita Querela, denied, filed May 22, 1986, 11a.

V. STATEMENT OF JURISDICTION

A Notice of Appeal to this Court was filed within 90 days from judgment of the Oklahoma Supreme Court.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and violations of Appellant's rights under the United States Constitution: specifically

the Fifth, Seventh, and Fourteenth Amendments.

VI. CONSTITUTIONAL PROVISIONS, STATUTES, COMMON LAW WRITS, AND COURT RULES INVOLVED

U.S. CONSTITUTION:

AMENDMENT V

"*** nor be deprived of life, liberty, or property, without due process of law; ***"

AMENDMENT VII

"In suits at common law, where the value in controvercy shall exceed twenty dollars, the right of trial by jury shall be preserved, ***"

AMENDMENT XIV

"*** nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OKLAHOMA CONSTITUTION:

ARTICLE II § 6

"The courts of justice of the State shall be open to every person, and speed and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

ARTICLE II § 7

"No person shall be deprived of life, liberty or property, without due process of law.

ARTICLE II § 19
"The right of trial by jury shall be and remain inviolate, ***"

OKLAHOMA STATUTES:
12 O.S.A. § 698
"*** provides for and authorizes a motion for judgment notwithstanding the verdict of the jury, ***"

22 O.S. 1951 § 857 (The Jury)
"*** not to permit any person to speak or communicate with them, ***"

22 O.S. 1951 § 894 (The Jury)
"*** the information required must be given in presence of, *** the defendant or his counsel, ***"

22 O.S. § 952
"*** by which his substanial rights have been prejudiced, ***" and Fifth, when the court has misdirected the jury in a matter of law, ***Sixth, when the verdict is contrary to law or evidence."

42 O.S. § 22
"The sale of any Property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien therein."

COMMON LAW WRITS:
AUDITA QUERELA
CERTIORARI
MANDAMUS
PROHIBITION

FEDERAL RULES OF CIVIL PROCEDURE

RULE 60 (b), 1946 AMENDMENT, note to Subdivision (b):

"*** Since the rules have been in force, decisions have been rendered that the use of bills of review, coran nobis, or audita querela, to obtain relief from final judgments is still proper, ***"

OKLAHOMA COUNTY DISTRICT COURT RULES:

RULE 5

" Except where a jury trial has been waived, a pretrial conference shall be held in all civil actions for the recovery of money or personal property where the amount or value in controvercy is at least $5,000.00 ***"

VII. STATEMENT OF THE CASE

Appellant Pointon operates a one-man real estate business out of his home. In early 1977, Appellant purchased a bulldozer and Appellee bank financed same at the rate of 9 3/4% simple interest. According to the Oklahoma Uniform Commercial Credit Code, this loan was a Consumer Loan. Subsequently in 1978, Appellant purchased additional equipment which it fell under the catagoerie of a consumer related loan. Appellant signed disclosure statements, customary for consumer loans as shown in the

record. The bank escalated these notes, illegally, up to 24% interest which is contrary to the "Balloon Note Provision" in the Code which says in essence: a renewed note should bear basically the same terms as the original note.

On or about Jnauary 1981, Senior Vice President Jim Hunter began to brow-beat Appellant's son, John Pointon, an independent homebuilder and threatened him with foreclosure and bankruptcy unless Appellant hypothecate additional land to cover his home loans. At no time did Appellant agree to guarantee to the bank, his son's obligations. The bank had devised a scheme and artifice to coerce and defraud Appellant under duress. The Appellant yeilded under duress and lost property demanded by the bank in their scheme. Appellant has another son, also an independent homebuilder using this bank who also had an inventory of unsold homes. The

bank refused to renew the two aforestated notes of Appellant and called them as a reprisal to this Scenario. Deeds and an affidavit in the record pre-dating this suit bear mute testimony to the abovestated.

Appellee filed suit to foreclose, and Appellant reciprocated by filing a cross-petition in the form of a counterclaim in order that the trial court could adjudicate all the issues. Jury trial was demanded in the instrument.

Next, the bank replevined the equipment and sold same in calloused-disregard for a best effort sale. The sale was conducted in a commercially unreasonable manner, thereby committing conversion before the case had time to come to trial.

Thereafter, the bank filed a motion to demur Appellant's counterclaim. The court sustained the demurrer and Appellant was stripped of his issues, save one, the conversion issue.

A four day trial was fought February 7, thru 10, 1984, with the jury out for verdict some four hours. The learned trial judge prejudiced the Appellant with Instruction no.9 which confused the jury and by communicating on two occaions with the jury during the time they were deliberating the verdict, as the transcript clearly reveals.

The confused jury returned a verdict that the bank was guilty of conversion and that Appellant must also pay a deficiency judgment of $25,209.17, which Appellant paid.

Defendant's counsel made motion for a verdict notwithstanding the verdict, which was denied.

Next, the court denied a motion for New Trial.

Later, the court granted an attorney's fee of $17,774.87 (70% of the judgment) to the bank, not the attorney, contrary to

the petition sued on limiting attorney fees to 15%, or $3,781.38.

On May 24, 1984, Appellant filed his Second Amended Petition in Error to the Oklahoma State Supreme Court, which was assigned to Appeals Court No. 1. On September 27, 1984, Appellant filed a Petition for a Writ of Mandamus and a Petition for Writ of Prohibition. Both Petitions were filed within this case as Supplemental Petitions and each contained the same"Issues In Error Proposed To Be Raised On Appeal." The Court ruled in an Order of January 14, 1986: Affirmed in part and reversed in part, for a new trial on the issue of punitive damages only, and reverse and remand attorney fee back to trial court for a new hearing.

On February 3, 1986, Appellant filed a Petition for Rehearing stating that he was eligible for more appeal grounds then the Court permitted in its January 14th Order and for return of the judgment paid by Ap-

pellant. Rehearing was denied on March 4, 1986.

On March 24, 1986, Appellant filed his Petition for Review by Oklahoma Supreme Court on Certiorari. Certiorari was denied May 6, 1986.

Then on May 19, 1986, Appellant filed his motion to vacate and nullify by the Common Law Doctrine of Audita Querela. The Court declined to consider the Common Law Writ in its Order of May 22, 1986.

It is after the above repeated denials of justice that Appellant brings this case to the United States Supreme Court.

VIII THE QUESTION IS SUBSTANTIAL

The questions as to the violation of the Appellant's Constitutional Rights provided in the Seventh Amendment and the due process and equal protection clauses of the Fifth and Fourteenth Amendments are substantial in the instant case.

The trial court usurped the province of the jury by sustaining the demurrer of the

Appellee in open violation of the Seventh Amendment to the United States Constitution and Article II Sec. 19 of the Oklahoma Constitution.

You said in *Slocum v. New York L. Ins. Co.*, 57 L. ed. 870:

> "***Thus, in *Bank of United States v. Smith*, 6 L. ed. 443, the demurrer was criticized as substituting the court in the place of the jury, ***"
>
> Slocum further said:
>
> "***Such a demurrer is permissable only when proposed by one party, joined in by the other, and allowed by the court. It must contain an express and distinct admission by the demurrant of every fact which the evidence of his adversary conduces to prove, else he cannot insist that the latter join in the demurrer;***"

You said in *Bank of United States supra*,

> "The demurrer to evidence is an unusual and antiquated practice which this court, and other courts, have recently endeavored to discourage, as inconvenient, and calculated to surpress the truth and justice or the cause.***The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows that it ought never to be admitted,

> where the party demurring refuses to admit the facts which the other side attempts to prove. ***"

The demurrer to the evidence in the instant case parallels this court's ruling in *Fowle v. Alexandria*, 6 L.ed 484(1826), you said:

> "Upon examination of the case at bar, it will be at once perceived that the demurrer to evidence tried by the principles already stated is fatally defective."

The Oklahoma County District Court again invaded the province of the jury during the trial. First, the learned trial judge clearly abused his discretion in a confusing misleading instruction to the jury. On page two of No. 9 of "Instructions to jury," the first sentence reads:

> "The amount of any verdict in favor of the defendants cannot exceed the sum of $1,290.83, the amount for which defendants sue."

(This deceptive instruction fits nowhere in this case.) See pages 11 and 12 in the Separate Appendix 17a and 18a.

In a similar case the Oklahoma Supreme said:

> "New trial will always be granted where judge interferes with lawful province of jury to prejudice of complaining party." *Slagle v. Amos*, 238 P. 445 (Okl. 1925).

Secondly, the court on two occasions communicated with the jury while the jury was out for verdict, see Separate Appendix 12a, 14a, 15a, 16a, and 17a. A synopsis of the invasion follows:

FROM THE TRANSCRIP:

> THE COURT: "*** Just before the jury announced that they had a verdict, they sent down a question. Normally, I call the attorneys in to tell them about the question and my response. I did not in this case but rather, answered the question on the paper that they sent down. ***I wrote right on there, r-i-g-h-t, *** Well, they still couldn't figure out what to do. So they sent it back down and said they still couldn't figure it out, *** So I wrote on the bottom, Please refer to Instruction 9, that's the instruction that tells them, If you find it was commercially reasonable, find in favor of the bank for that twenty-six thousand."

How much more clear does this need to be?

> THE COURT: "Well it isn't proper for the Judge to communicate with the jury and certainly without the attorneys being present. ***"

See copy of transcript in the Separate Appendix 12a, 14a, 15a, 16a and 17a.

In a parallel case of the trial Court's impropriety, *Green v. State*, 281 P.2d 200, the Oklahoma State Supreme Court said:

> "We are of the opinion that the facts herein present such flagrant disregard of the directions in the statutes, § 857 and § 894, 220 O.S. 1951, as to compel reliance upon the presumption of prejudice. *** the judgment *** herein imposed is accordingly reversed and the cause remanded for a new trial."

Following, the trial Judge's confessed improper acts, counsel for Appellant addressed a verbal motion to the Court: "*** could we ask for a verdict notwithstanding the verdict ***"

The Court demurred the motion.

After the motion the trial Court was bound by Oklahoma law, 12 O.S. § 698 and 22 O.S. § 952 to set aside the final judgment and grant a new trial or grant judgment notwithstanding the verdict.

The jury found the Appellee guilty of conversion which the transcript clearly reveals. Then the jury deducted $1,500.00 from the judgment.

The judgment violates 42 O.S. 22 which says:

> "The sale of any Property on which there is a lien in satisfaction of the claim secured thereby, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes the lien therein."

The Oklahoma Supreme Court said:

> "Under this section (42 O.S. § 22) on holding lien on personal property extinguishes it by wrongfully converting property to his use." *Wilson Motor Co. v. Dunn,* 246 P. 194 (Okl. 1923).

Finally we come to Appellant's last Appeal for justice in the State Courts by Audita Querela. Appellant's case is similar in many respects to *Humphreys v. Leggett,* 13 L. ed. 145:

> "***The complainant tendered this plea at the proper time, and was refused the benefit of it, not because it was adjudged insufficient as a defense, but because the court considered they had no discretion to allow it. ***The party

> was not guilty of latches, but lost the benefit of his defence, by an accident over which he had no control. He is, therefore, in the same condition as if the defense had arisen after judgment, which would entitle him to relief by audita querela, ***"

The unfair judgment monies paid by Appellant should be returned with interest.

The trial court denied a motion for judgment notwithstanding the verdict, and denied a motion for a new trial on March 2, 1984.

The judgment was appealed to the Oklahoma Supreme Court as follows: Petition in Error, Petition for Writ of Mandamus, Petition for Writ of Prohibition, Petition for Rehearing, Petition for Writ of Certiorari, and for Writ of Audita Querela.

This instant case is also in direct violation of the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment of the United States Constitution. A case with similarities follows:

The U.S. Court of Appeals, Tenth circuit said in *Roberts v. Anerson et al,* 66 F. 2d 874 (1933):

> " *** If the county court erred, either during the trial or in its decision, the error must be corrected on appeal to the higher courts. If, however, the determination of the county court was lacking in the essentials of due process, then the determination is a nullity ***

The predilection of the Oklahoma Courts are so lacking in this instant case that it offends due process.

The question revolves down to: whether the Oklahoma County Courts are going to rule according to the State and Federal Constitutions, the statutes, the case law, and the evidence, or, are they going to yield to the undue influence of the banking lobby.

In view of the foregoing, Appellant respectfully submits his case to this Honorable Court for Review and Prays that:

1. The aforestated judgment and attorney's fees be overturned, set aside, held

for nought due to conversion and be wholly satisfied and discharged;

2. That judgment monies paid by Defendant be returned to him along with interest at the rate of 2½% above the bank's prime rate;

3. That reasonable attorney's fee be granted to Defendant Apellant;

4. That said property coerced by duress be paid for which it had a value of $15,000.00 at date of coercion, with interest paid at 2½% above bank prime;

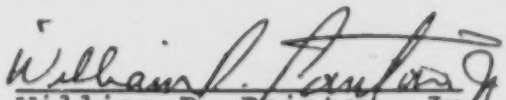
5. That in event of a New trial, the jury be instructed for punitive damages because of conversion and all the issues of Appellant's cross petition and counterclaim be adjudicated by jury, and that paragraphs 1,2,3 and 4 above be adjudged by this Court in favor of Appellant;

6. This litigation was officially filed in Court on April 22, 1981. It has been oppressive, expensive and burdensome to Ap-

pellant. Appellant urges this Court in the name of justice and fairness to modify the existing judgment to conform to paragraphs 1,2,3 and 4.

7. And for such Order that this Court find appropriate and just.

Respectfully submitted in the interest Justice!



William P. Pointon, Jr.
Attorney pro se
P.O. Box 4130
Nicoma Park, Okl. 73066
(405) 769-3365

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA, COUNTY OF OKLAHOMA, ss:

I, William P. Pointon, Jr., depose and say that I am attorney pro se herein being duly sworn, states: that forty copies of the Jurisdictional Statement addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543, and three copies of same were deposited in a U.S. Post Office August 1, 1986, first class, postage prepaid, to each of the parties required to be served, as follows: Roland Tague, Counsel for Fidelity Bank, 901 Fidelity Bank Plaza, Oklahoma City, Oklahoma. (405) 236-5303.

All parties required to be served have been served.

William P. Pointon, Jr.

William P. Pointon, Jr.
Attorney pro se
P.O. Box 4130
Nicoma Park, Okl. 73066
(405) 769-3365

Subscribed and sworn before me on August 1, 1986. My commission expires 5/2/1987

Notary Public L. Jean Smith

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that W. P. Pointon, Jr., the Defendant-Appellant above named, hereby gives notice of appeal to the Supreme Court of the United States from the Oklahoma State Supreme Court Order of May 22, 1986, and previous Orders.

(W. P. Pointon, Jr.)
W. P. Pointon, Jr.
Attorney pro se

CERTIFICATE

I hereby certify that I served a copy of the Notice of Appeal to the United States Supreme Court, by mailing the same first class, postage prepaid to Roland Tague, Counsel for the Plaintiff, at 901 Fidelity Bank Plaza, Fidelity Bank Building, Oklahoma City, Oklahoma, on this 18th day of June, 1986, and to the Oklahoma State Supreme Court and to the Oklahoma County District Court.

(W. P. Pointon, Jr.)

* A copy of actual instrument with filed stamps of the Oklahoma Supreme Court and County Court is in "Separate Appendix 20a. "

SEPARATE APPENDIX

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FIDELITY BANK, N.A., Plaintiff,	)	
vs.	)	No. CJ 81-1886
W. P. POINTON, JR., d/b/a SIERRA POINTON FUND, INC., and W. P. POINTON, JR., individually, Defendant.	)	

ORDER

On this 19th day of March, 1982, this matter comes on for hearing upon the Motion to Strike, Demurrer and Motion For Judgnent On The Pleadings of the Plaintiff, Fidelity Bank, N.A., and the Court being fully advised in the premises finds, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Demurrer to the Counter-Claim of the Defendant is hereby sustained as to the Sixth Defense, Seventh Defense and Eighth Defense, and as to the First Counter-claim and Second Counter-claim, and as to damages only in the Third Counter-claim, and the Defendant is granted

twenty (20) days from the date hereof in which to amend its Third Counter-claim.

IT IS FURTHER ORDERED that the Motion to Strike and the Motion For Judgment On The Pleadings are hereby rendered moot by the sustaining of the Demurrer.

(Raymond Naifeh)
District Judge

CERTIFIED 3-31-82, Dan Gray, Court Clerk.
By (Deputy)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

JOURNAL ENTRY UPON VERDICT OF JURY

On this 7th day of February, 1984, came Plaintiff, Fidelity Bank N.A., in person and by and through its attorney, Roland Tague, and also come the Defendant, W. P. Pointon, Jr., d/b/a Sierra Pointon Fund, Inc. and W. P. Pointon, Jr., in person and by and through his attorney, Claude V. Sumner, and this cause came on for trial in its regular order before a jury of twelve (12) persons who being duly impaneled and

sworn well and truly to try the issues joined between Plaintiff and Defendant, and the case was continued over and further evidence was taken on February 8, 1984, February 9, 1984, and on February 10, 1984, a true verdict rendered according to the evidence; and the jury having heard the evidence, the charges of the Court and the argument of counsel upon their oath, say:

"We, the jury, impaneled and sworn in the above entitled cause, do, upon our oaths, find for the Plaintiff, and fix the amount of its recovery at $25,209.17."

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff, Fidelity Bank, N.A., have and recover from the Defendant, W. P. Pointon, Jr., Judgment in the sum of $25,209.17, together with interest at the rate of two and one-half percent (2-1/2%) above Fidelity Bank, N.A.'s floating prime rate of interest from February 7, 1984 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Fidelity Bank, N.A., have and recover from the Defendant, Sierra Pointon Fund, Inc., judgment in the sum of $5,764.07, with interest from February 7, 1984, at the rate of two and one-half percent (2-1/2%) per annum above Fidelity Bank, N.A.'s floating prime rate of interest until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff, Fidelity Bank, N.A., recover judgment against the Defendants, W. P. Pointon, Jr. and Sierra Pointon Fund, Inc., in the sum of $12,010.80 as and for attorneys fees, and the further sum of $252.00 as costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Replevin Bond be and is hereby exonerated and discharged.

(John M. Amick)
District Court

CERTIFIED 9-26-84, DAN GRAY, COURT CLERK
By (Deputy)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

ORDER

Now on this 2nd day of March, 1984, this matter comes on for hearing upon the Motion for New Trial of the Defendants W. P. Pointon, Jr., d/b/a Sierra Pointon Fund, Inc., and W. P. Pointon, Jr., individually, and the Court, having heard argument of counsel and being fully advised in the premises finds, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court, that the Motion for New Trial of the Defendants, W. P. Pointon, Jr., d/b/a Sierra Pointon Fund, Inc., and W. P. Pointon, Jr., individually, be and the same is hereby overruled.

(John M. Amick)
District Judge

CERTIFIED 9-26-84, DAN GRAY, COURT CLERK
By: (Deputy)

IN THE SUPREME COURT OF
THE STATE OF OKLAHOMA

October 4, 1984

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

61,918 - IN RE: WILLIAM P. POINTON, JR.

Appellant's application for writ of mandamus is in substance an attempt to forestall enforcement of the trial court's order of April 13, 1984, and as such will be treated as the functional equivalent of a motion to stay. Appellant may urge such motion in the trial court. Any party aggrived by trial court's ruling may seek review of same, within framework of this appeal. Tisdale v. Wheeler Bros. Grain Co., 599 P.2d 1104 (Okl. 1979).

(Don Barnes
Chief Justice

CERTIFIED 7-31-86, James W. Patterson Ct. C.

STATE OF OKLAHOMA)
SUPREME COURT) ss. MANDATE

FIDELITY BANK, N.A.)
V.) No.
W.P. POINTON, JR., d/b/a/ Sierra) 61,918
POINTON FUND, INC. et al.,)

THE SUPREME COURT OF OKLAHOMA:

To the Honorable Judge of the District Court of Oklahoma, Cnty in said State of Oklahoma.

Whereas, the Court of Appeals of the State of Oklahoma, did on the 14th day of Jan., 1986 render an Opinion in the above entitled cause, appealed from the District Court of Okla. Cnty: AFFIRMED/PART REVERSED/PART

Now, Therefore, you are hereby commanded to cause such Affirmance & Reversing to show of record in your court and to issue such process and take such other and further action as may be in accord with right and justice and said Opinion.

Witness, the Honorable Robert Simms , Chief Justice of the Supreme Court of the

State of Oklahoma, at the City of Oklahoma City, this 16th day of May, 1986.

James W. Patterson, Cl.
By (Deputy)

FILED in Oklahoma County District Court
May 22, 1986, Tom Petuskey, Court Clerk
By: (Deputy)

THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA

Division No. 1

Fidelity Bank, N.A., Appellee
v.
W. P. Pointon, Jr. d/b/a Sierra Pointon Fund, Inc., and W. P. Pointon, Jr., individually Appellant.

No. 61,918

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA HONORABLE JOHN AMICK JUDGE, AFFIRMED IN PART: REVERSED IN PART AND REMANDED WITH INSTRUCTIONS

W. P. Pointon, Jr.
Choctaw, Oklahoma, Pro Se

Roland Tague
Oklahoma City, Oklahoma, For Appellee.

Opinion by Lester A. Reynolds, Judge:

Defendant W. P. Pointon, Jr. received a

loan from Fidelity Bank, N.A. (Bank). Road construction equipment was used as collateral. Defendant defaulted on the note. Bank sold the collateral and sued for the deficiency. Defendant counterclaimed alleging the sale of the equipment was not done in a commercially reasonable manner. Defendant requested punitive damages. The trial judge did not give instructions concerning punitive damages.

The jury ruled for the Bank granting $25,209.17. Jury reported sale was not commercially reasonable and offset the deficiency by $1,500.00.

Defendant moved for new trial on two grounds: 1) It was error for trial court to refuse punitive damages and 2) The verdict was not sustained by the evidence and was contrary to case law. This motion was denied.

In its petition, Bank requested attorney's fee in the amount equal to 15 per

cent of the verdict. This amount is $3,781.38. The trial court granted $12,010 in attorney's fee.

Defendant appeals on numerous grounds. However, O.S. 1981 §991 (b) states:

> "If a motion for a new trial be filed and a new trial be denied, the movant may not on the appeal raise allegations of error that were available to him but were not therein asserted."

Further, we said in Federal Corp. v. Independent School District, 606 P.2d 1141 (Okl. Ct. of App. 1980), general allegations of error in a motion for new trial may not preserve specific errors on Appeal. The Statement "the verdict is not sustained by the evidence and contrary to case law" does not direct the trial court's attention to the specific errors that have been raised on appeal. The propositions of error are not considered except as to the issues of punitive damages and attorney's fees.

Defendant contends the trial court erred in not giving a punitive damage instruc-

tion to the jury. The jury found the Bank had not sold the collateral in a commercially reasonable manner. Defendant contends this was done with malice. We said in Sopkin v. Premier Pontiac, Inc., 539 P.2d 1393; 1397 (Okl. Ct. of App. 1975):

> "Only where there is no evidence whatsoever that would give rise to an inference of actual malice or conduct deemed equivalent to actual malice may a trial court refuse to submit an exemplary damage instruction to the jury."

We said the evidence required could be "a conscious indifference to consequences." Jury reported sale was not commercially reasonable and offset the deficiency by $1,500. In Davidson v. First National Bank of Yale, 559 P.2d 1228; 12233 (Okl. 1976), our Supreme Court said a cavalier attitude on the part of the Bank is sufficient evidence to send the question of punitive damages to the jury. The trial court erred in not presenting this issue to the jury. We reverse for a new trial on the issue of punitive damages only. Judgment is other-

wise affirmed.

Finally, Defendant complains the attorney's fee assessed against him was excessive. In reviewing the journal entry of judgment we can not disagree with Defendant that a $12,000 attorney fee on a $25,000 claim is excessive. We reverse and remand the issue of a proper attorney fee back to the trial court to hold a hearing consistent with State of Oklahoma, el rel. Burk v. City of Oklahoma City, 598 P.2d 659 (Ok. 1979).

AFFIRMED IN PART: REVERSED IN PART AND REMANDED WITH INSTRUCTIONS.

Hansen, J. concurs; Gray, P.J. concurs in part and dissents in part.

CERTIFIED 7-3-86, Tom Petuskey, Ct.Clk.
By: (Deputy)

RELEASE FOR PUBLICATION

BY ORDER OF COURT OF APPEALS

THE COURT OF APPEALS, OKLAHOMA CITY

DIVISIONS, STATE OF OKLAHOMA

March 4, 1986

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

61918 - Fidelity Bank, N.A., Appellee v. W. P. Pointon, Jr., d/b/a Sierra Pointon Fund, Inc., and W. P. Pointon, Jr., individually, Appellant.

Appellant's Petition for Rehearing is DENIED.

(Karl R. Gray)
Presiding Judge

CERTIFIED 7-31-86, James W. Patterson, Court Clerk, By:(Deputy)

IN THE SUPREME COURT OF THE

STATE OF OKLAHOMA

May 6, 1986.

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

61,918 - Fidelity Bank, N.A. v. W. P. Pointon,Jr., d/b/a Sierra Pointon Fund Inc. and W. P. Pointon, Jr. individually.

CERTIORARI DENIED.

CONCUR. Simms, C. J. Hodges, Lavender, Hargrave, Opala, Wilson, Kauger, Summers,JJ.

(Summers)
Chief Justice

CERTIFIED 7-31-86, James W. Patterson, Court Clerk, By: (Deputy)

IN THE SUPREME COURT OF THE

STATE OF OKLAHOMA

May 22, 1986.

THE CLERK IS DIRECTED TO ISSUE THE FOLLOW-

ORDERS:

61,918 - FIDELITY BANK, N.A. v. W. P. POINTON, ET AL.

Court declines to consider appellant's post-mandate motion to vacate.

(Summers)
Chief Justice

CERTIFIED 7-31-86, James W. Paterson,

Court Clerk, By: (Deputy)

BEST AVAILABLE COPY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FIDELITY BANK, N.A. Plaintiff,	)	
v.	)	No. C. J. 81-1886
W. P. POINTON, JR., d/b/a SIERRA POINTON FUND, INC. & W. P. POINTON, JR., individually. Defendant.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HAD ON THE

7th, 8th, 9th & 10th DAY OF FEBRUARY, 1984

BEFORE THE HONORABLE JOHN M. AMICK,

DISTRICT JUDGE.

APPEARANCES:

MR. ROLAND TAGUE, Attorney at Law, 901 Fidelity Plaza, Oklahoma City, Oklahoma appeared on behalf of the Plaintiff.

MR CLAUDE V. SUMNER, Attorney at Law, 7547 S. E. 15th Street, Midwest City, App- on behalf of the Defendant.

Page 202 of Transcrip, lines 2 through 9

THE COURT: Judge Naifeh conducted the pre-trial conference in this case. Did he?

MR. SUMNER: Not really. We just did it on our own, best we could. He had a trial going on and we left the material to be signed and I want to acknowledge---

THE COURT: You didn"t really have a pre-trial conference?

MR. TAGUE: we didn't.

Page 360 of Transcrip.

THE COURT: Gentlemen, would you come up here, please.

Just before the jury announced that they had a verdict, they sent down a question. Normally, I call the attorneys in to tell them about the question and my response. I did not in this case but rather, answered the question on the paper that they sent down. And the reason I did that was because they had reached a verdict at that time. It was obvious they had decided what they were going to do. And they were simply having difficulty deciding -- apparently, my verdict forms were confusing to them. And they couldn't figure out which verdict to fill out. Well, the jurors tore up the question but what it said was this: We have decided that they did not sell the property in a commercially reasonable manner and that, therefore, we want to deduct fifteen hundred dollars from what Mr. Pointon owes

the bank. This would leave the sum that they finally put in the verdict, but we can't figure out how to put it in the verdict. So, I first -- it was something like that. Anyway, I thought they had figured out what they wanted to do. I wrote right on there, r-i-g-h-t, and signed my name and sent it back up there. Well, they still couldn't figure out what to do. So they sent it back down and said they still couldn't figure it out, or the bailiff said, Judge, they still can't figure out what verdict to fill in. So I wrote on the bottom, Please refer to Instruction 9, that's the instruction that tells them, If you find it was commercially reasonable, find in favor of the bank for what, twenty-six thousand.

MR. SUMNER: That's correct, Your Honor.

THE COURT: But if you find it wasn't reasonable, deduct that and the Defendant suffered damages. And at that time, apparently, they got it.

NOW, if you have ojections to that procedure, why, you will just have to dictate them into the record.

MR. SUMNER: For the record, I know attorneys always doing that, I think, for the record, I will object to the procedure just for the preservation of the record.

THE COURT: Well, it isn't proper for the Judge to communicate with the jury and certainly without the attorneys being present. But it was obvious to me that they had reached a decision and all they needed was a little help in figuring it out. The note is there if you want to take the time ---- it didn't occur to me that they would tear it up.

MR. SUMNER: Also, on the record could we ask for a judgment notwithstanding the verdict for ---

THE COURT: Well, you have to file that in writing.

MR. SUMNER: Right. But on the record, I

would like to indicate that I would be interested in that, file a notice with intent to appeal.

END OF PROCEEDINGS

CERTIFICATE OF THE COURT REPORTER

I, Marcy A. Hennes, Certified Shorthand Reporter and Official Court Reporter for Oklahoma County do hereby certify that the foregoing transcript in the above-entitled case is a true, correct and complete transcript,of my shorthand notes, of the hearing in said cause.

Dated this 13 day of September, 1984.

(Marcy A. Hennes, c.s.r.)
Official Court Reporter in and for the State of Oklahoma.

JURY INSTRUCTION

No. 9

The plaintiff, Fidelity Bank, N.A. has established that there is now due the total sum of $26,709.17, after having given the defendants credit for the proceeds of the sale of the equipment on October 6, 1981. If you find that the sale of the equipment by the plaintiff bank was conducted in a commercially reasonable manner, your verdict should be for the plaintiff for this amount.

If you find that the sale of the equipment was not conducted in a commercially reasonable manner, you should then determine what damage, if any, the defendants suffered as a direct result of the manner in which the equipment was sold.

If, having found that the defendant suffered such damage, you determine that such damage is less than the total indebtedness due the plaintiff, such amount should be

deducted from the amount of such indebtedness and a verdict rendered in favor of the plaintiff for the difference. If you find that such damage is greater than the indebtedness due the plaintiff your verdict should be in favor of the defendants for the amount such damages exceed the sum of $26,709.17.

The amount of any verdict in favor of the defendants cannot exceed the sum of $1,290.83, the amount for which the defendants sue.

You will now hear the argument of counsel, which is a proper part of this trial.

CERTIFIED 4-10-85, Tom Petuskey, Ct. Clk.

By: (Deputy)

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that W. P. Pointon, Jr., the Defendant-Appellant above named, hereby gives notice of appeal to the Supreme Court of the United States from the Oklahoma State Supreme Court Order of May 22, 1986, and previous Orders.

(W. P. Pointon, Jr.)
W. P. Pointon, Jr.
Attorney pro se

CERTIFICATE

I hereby certify that I served a copy of the Notice of Appeal to the United States Supreme Court, by mailing the same first class, postage prepaid to Roland Tague, Counsel for the Plaintiff, at 901 Fidelity Bank Plaza, Fidelity Bank Building, Oklahoma City, Oklahoma, on this 18th day of June, 1986, and to the Oklahoma State Supreme Court and to the Oklahoma County District Court.

(W. P. Pointon, Jr.)

* A copy of actual instrument with filed stamps of the Oklahoma Supreme Court was filed in the Oklahoma County Court the 20th day of June, 1986.